Supreme Court of the United States.

OCTOBER TERM, 1964.

No. 232 of 1964.

UNITED STATES OF AMERICA,
Appellant,

v.

BOSTON AND MAINE RAILROAD ET ALS.,
Appellees.

BRIEF FOR THE APPELLEES PATRICK B. McGINNIS, GEORGE F. GLACY AND DANIEL A. BENSON.

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MISCELLANEOUS.

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF MASSACHUSETTS.

BRIEF FOR THE APPELLEES PATRICK B. McGINNIS, GEORGE F. GLACY AND DANIEL A. BENSON.

REFERENCE TO GOVERNMENT'S BRIEF.

The appellees for whom this brief is submitted are satisfied with the Government's statement of the case (on pp. 3 through 6 of its brief), except for the reference to count II,* with the Government's reference to the opinion below (p. 1),† its statement of the grounds upon which jurisdic-

*Count II is not part of the record before this Court. See the discussion at pages 25 through 27, *infra*.

† The opinion is also reported at 1964 Trade Cases, ¶ 70,999.

tion is invoked (pp. 1 and 2), and the setting forth of the statute involved, Section 10 of the Clayton Act (pp. 2 and 3.) Hence they make no further statement of the items called for by paragraphs (a), (b), (c), and (e) of Rule 40(1) of this Court.

QUESTION PRESENTED.

The question before the Court is whether or not (in the words of Section 10) a "substantial interest" in International corporation would exist upon an alleged "understanding, agreement, relationship, arrangement and concert of action" among two of the individual defendants and International (1) for "the purpose of producing profits for International" from dealings by it in property acquired from the Boston and Maine through the "intervention, direction or assistance" of the individual defendants (2) "pursuant to ~~which~~" they "were to and did receive substantial monies" (Particulars, R. 24-25).

SUMMARY OF ARGUMENT.

1. Section 10 is a penal statute and as such should be strictly construed; the legislative intent must be gathered from the ordinary usage of the language employed (pp. 4-7).

2. An interest in a corporation or other business entity, construed according to common usage and judicial decision, means a proprietary interest; this has been uniformly held in construing similar phrases (pp. 7-11); the juxtaposition of the interlocking provisions likewise indicates, under *noscitur a sociis*, a position within the corporation (p. 11);

the statute differs from conflict of interest laws and regulations, which prohibit interests in "pecuniary profits," "contracts" or "transactions" (pp. 11-14).

3. The legislative history of Section 10 supports the same conclusion (pp. 14-22); it is not a conflict of interest statute, but is part of the Clayton anti-trust law, designed to supplement earlier anti-trust laws by making unlawful certain trade practices tending to monopoly; one of those trade practices was interlocking of directorates and officers and Section 10 was designed solely to meet that ~~evil~~ (pp. 14, 15); the original House bill prohibited interlocking between common carriers and corporations with which they dealt; the Senate rejected these prohibitory provisions, substituting the competitive bidding requirements where there were interlocks (pp. 15, 16); to prevent evasion of the interlocks the Senate made the law applicable where the carrier's directors or officers had "any direct or indirect interest" in the other company; when the bill went to conference this phrase was narrowed to " a substantial interest" (p. 16).

4. As the law imposes the primary punishment on the carriers, it should not be extended to make them liable for secret misconduct of their officers and directors which by its nature would be unknown to them (pp. 22-25).

5. The particulars do not allege such an interest; the "alleged" interest shows no control, continuity of relationship or determinate share in the corporation's profits; they distinguish between the "profits" for International and the "substantial monies" to be paid the individual defendants (pp. 25-27); the Government's argument erroneously describes the indictment as alleging defendants' sharing in the corporation's profits (pp. 25-26), and improperly assimilates the allegations of count II, which is not before the Court (pp. 27, 28).

ARGUMENT.

I. Section 10 of the Clayton Act is a Penal Statute and should be Strictly Construed.

Section 10 is a criminal statute. As such, it is to be strictly, not loosely, interpreted. If the concept of an "interest" in a "corporation" or other business is not generally understood to include a non-proprietary arrangement, it is presumed that, in passing a criminal statute containing such language as the test, Congress did not intend such inclusion.

The familiar rule in construing penal laws has been applied so frequently and for so long that it would be difficult to select a landmark case. As early as 1820 Chief Justice Marshall pointed out that—

> "The rule that penal laws are to be construed strictly, is, perhaps not much less old than construction itself."
>
> *United States* v. *Wiltberger,* 5 Wheat. 76, 95-96.

As the Court said in the *Wiltberger* case, the legislative intention in a criminal case must be gathered from the language employed, not from the language that might have been employed. If the language does not cover the act complained of, there is no justification for extending the statute.

As far as can be determined, the Court has never departed from a standard of strict, reasonable interpretation of criminal statutes. There are numerous cases where the Court has explicitly said that it would not do so. For example, *Smith* v. *United States,* 360 U.S. 1, 9; *United States* v. *Alpers,* 338 U.S. 680, 682; *United States* v. *Raynor,* 302 U.S. 540, 552; *United States* v. *Noveck,* 271 U.S. 201, 204;

and *United States* v. *Hartwell,* 6 Wall. 385. This standard of interpretation of course does not mean that the words of a criminal statute, where alternative interpretations are possible, are to be resolved into one which is implausible. It does contemplate, however, that such a statute is not to be read in a far-fetched interpretation merely because some result would follow which the prosecution or the tribunal believes desirable.

Later in this brief (at pp. 7-14) we show that the critical words "substantial interest in [a] corporation" do not include, as a matter of either general usage or legal usage, the kind of arrangement alleged in the particulars at R. 24-25. If we might assume that that kind of arrangement is one that *ought* to be prohibited in some law, the answer still is that it is not covered by Section 10's language.

The argument of the United States is in part that, if International had an uncompensated common director with the B&M, who stood to gain nothing, there would have been a violation, and that "the result must, we submit, be the same in the present case where the danger of injury to the carrier is far greater" (p. 25). The standard of interpretation which this Court, and judges in the United States generally, have followed is not consistent with such an approach.

The right view of a penal statute cannot be simply to take the most innocent act that it clearly punishes, and then to prosecute under the same law everything placed lower in the moral or social scale.

We think the present is not a mere *casus omissus* or an instance of inadvertence by Congress, as the legislative history discussed below will show (see pp. 14-22, *infra*). Yet, even if it were, there would nevertheless be a wrong result if the gap were to be filled in by afterthought.

Compare *United States* v. *Harris*, 177 U.S. 305, 309, where the word "company" as used in a criminal law was held not to include receivers of a company:

"Only by a strained and artificial construction, based chiefly upon a consideration of the mischief which the legislature sought to remedy, can receivers be brought within the terms of the law. But can such a kind of construction be resorted to in enforcing a penal statute? Giving all proper force to the contention of the counsel of the Government, that there has been some relaxation on the part of the courts in applying the rule of strict construction to such statutes, it still remains that the intention of a penal statute must be found in the language actually used, interpreted according to its fair and obvious meaning. It is not permitted to courts, in this class of cases, to attribute inadvertence or oversight to the legislature when enumerating the classes of persons who are subjected to a penal enactment, nor to depart from the settled meaning of words or phrases in order to bring persons not named or distinctly described within the supposed purpose of the statute."

An observation on the point is found in the opinion of Mr. Justice Brandeis in *United States* v. *Weitzel*, 246 U.S. 533, 543, at n. 2, collecting several instances of statutes which had been held not to cover activities which were within the same general classification and indeed policy as those covered and which Congress afterward voted to include. The opinion remarks:

"The fact that in 1879 Congress should have found it necessary to enact a general law for the punishment of officers of the United States who embezzle property

entrusted to them, but not owned by the United States, shows both how easily a *casus omissus* may arise and how long a time may elapse before the defect is discovered or is remedied. Statutes creating and defining crimes are not to be extended by intendment because the court thinks the legislature should have made them more comprehensive." (*Ibid.*)

II. An "Interest" in a Corporation, within the Context of Section 10, Construed According to Common Usage and Judicial Decision, Refers to a Proprietary Interest and does Not Embrace Such a Relationship as That Described in the Bill of Particulars.

As appears later in this brief (pp. 14 through 16, below), the words of Section 10 have been selected with care. Hence the vital point of the case should be an examination of those words, and not of policies susceptible of accomplishment with a different statutory philosophy using other language.

By ordinary usage, "interest in a corporation," in contrast to words such as "interest in a contract," or "in a transaction," would not include the kind of relation here involved.

(i) Cases Involving Phrases such as "Interest in a Corporation" or "Interest in a Business."

There are indeed several areas of civil law where courts have had an opportunity to consider what is meant by such phrases as "interest in a corporation," "interest in a business," and "interest in property." In none of these cases have such words been construed as liberally as the Government would like to construe the present penal law.

Federal estate tax. In *Helvering* v. *Safe Deposit & Trust Co. of Baltimore,* 316 U.S. 56, this Court construed Section 302(a) of the Revenue Act of 1926. The Act included in the "value of the gross estate" of a decedent the "value . . . of all property, real or personal, tangible or intangible, wherever situated— (a) To the extent of the interest therein of the decedent at the time of his death." The decedent in question died holding two unexercised powers of appointment. The Court held that he nevertheless had no "interest" in the appointive assets within the meaning of the taxing statute.

It likewise was held that even an exercised power of appointment did not bring appointive assets into the gross estate of a donee under Section 202(a) of the Revenue Act of 1916, applicable to property "To the extent of the interest therein of the decedent at the time of his death." *United States* v. *Field,* 255 U.S. 257. This was so although creditors of the donee of the power could have reached the assets under applicable Illinois law.*

Construction of wills. Again, suppose that a testator leaves "all my interest in X Corporation" to a certain individual. Would anyone suppose that the words included a debt or similar right or arrangement in favor of the testator?

The courts have uniformly held the contrary.

For example, in *Riverside Trust Co.* v. *Rogers,* 89 Conn. 690, 695-696, 96 Atl. 180, a will gave the testator's sister "all interest which I may have in said Rogers Paper Manufacturing Company and its shares." After asking whether

*The statutory law of taxation applicable to general powers is, of course, entirely changed at the present time. This is, however, the consequence of careful legislative revision, not the result of a strained interpretation of the concept of an interest in property.

the testator meant "to give to her the claims he had against the company for moneys loaned as evidenced by notes due, and for dividends and salary due," the Court ruled that the gift included *not one* of these items:

> "'An interest in a company' is not appropriate language with which to describe all obligations against the company which the testator might have. In this connection it means the right of property or share which the testator had in this company." (89 Conn. at 696.)

In *Major* v. *Major*, 106 Ind. App. 90, 96, 15 N.E. 2d 754, the Court reached a similar result, saying:

> "Generally speaking, an indebtedness due from a corporation to another, even though the person to whom the debt is owing be a stockholder of the corporation, does not, because of the debt, confer upon the person to whom it is payable an interest in the corporation. It is not so generally understood. A creditor's right is superior to that of a stockholder, but he has no right because of this relationship to any voice in the management or control of the corporation, or no interest therein within the meaning of that word in accordance with its ordinary usage."*

Attachment. In Massachusetts, and in some other states, local law permits attachment in equity of shares or interests in corporations. These statutes are interpreted

*To the same effect see *Johnson* v. *Goss*, 128 Mass. 433, 436-437; *In re Beard*, 57 Law Journal (N.S.) Ch. 887 (*held* that a debt due to the testator from a partnership business did not pass by a bequest of all his "share, right, and interest" in the partnership); *In re Earp's Will*, 1 Pars. Selected Cases (Pa.) 453 (same).

to exclude even remote or indirect ownership interests. In *Stone, Timlow & Co. Inc.* v. *Stryker,* 230 Mass. 67, 73, 119 N.E. 655, the Court interpreted such a statute authorizing the Superior Court in equity "to reach and apply shares or interests in corporations." Suit was brought to reach and apply stock in the defendant's possession but standing in the name of one Stone. The corporation's by-laws contained a stock-transfer restriction. Holding a demurrer properly sustained, the Court said:

> "The possibility that the court, in the bill now pending to compel Stone to effect a transfer of stock in the plaintiff corporation, may order specific performance of the agreement of Stone to transfer the stock to the defendant, is neither an ownership of shares nor an interest in the corporation within the meaning of the statute."

To the same effect see *Pennsylvania Co.* v. *United Railways of Havana,* 26 F. Supp. 379 (D. Me.), where the Court pointed out that "It is clear that the word 'interest' refers to a fractional ownership in the corporation and not to any equity of redemption" (at p. 384).*

The upshot of these cases is that the words upon which the Government rests its case are words which have been judicially interpreted to mean the precise opposite of the Government's construction. Only a proprietary right or share in the business is suggested by the actual language of

*Compare *Dexter* v. *Cotting,* 149 Mass. 92, 95, construing a probate bond law: "The words of the statute, 'all the persons beneficially interested in the trust,' mean all persons who have a present vested interest, and are not intended to include all persons who may possibly become interested in the future. When the Legislature deals with the rights of parties not in being, or not ascertained, who may have a contingent interest in a trust, or, for instance, in the case of a sale of the trust estate, it uniformly speaks of them as parties who 'may become interested.'"

Section 10. Accordingly Section 10 cannot be interpreted to mean more.

This sense of the phrase is also demonstrated by the context in which it appears in the statute. It is used disjunctively with words describing an interlocking of officers or directors; it is an "either/or" disqualification for certain intercorporate dealings. This would seem to suggest a position of control within the "other corporation." *Noscitur a sociis.* And we shall show later that the phrase was added for the very purpose of preventing evasion of the interlocking disqualification (*infra*, pp. 16, 18). In this context it is inapposite to a relationship whereby the railroad's officers, in effect, use, or act with, another corporation (but not from control within it) to effectuate transactions from which they may "receive monies."

(ii) Distinguishable Statutes and Cases.

The interpretation placed on Section 10 by the District Court is supported by the circumstance that other statutes deal with related problems in a contrasting manner.

The case at bar thus stands in marked contrast to those cited by the Government on pages 11 and 12 of its brief. Not one of those cases involved statutory or regulatory proscriptions dependent upon an interest in a business entity. On the contrary, they all were situations involving conflicts of loyalty arising in a particular transaction as distinguished from an interest in an entity.

For example, the case is unlike in this respect the situation before the Court in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520. The following indicates the principal differentiating features:

1. The statute in that case, 18 U.S.C. § 434, was a conflict-of-interest law, applicable solely to individuals

who act as officers or agents of the United States with conflicting interests. The statute here is an antitrust statute primarily applicable to railroad corporations and only secondarily to the officers or agents of such corporations.

2. The law in the *Mississippi Valley* case applied to federal officers or agents who were "directly or indirectly interested" in the private aspect. There was no requirement of substantiality. Section 10 in contrast applies only where the railroad officer or agent has a "substantial interest" in the other corporation, and an indirect interest presumably is not sufficient.

3. Section 434 covered any case where the federal officer or agent was interested "in the pecuniary profits or contracts of any [private] corporation." The Clayton Act requires that the officer or agent of the railroad have a substantial interest in "such other corporation" and not just in the profits or contracts of such other corporation.*.

Again, in *Securities & Exchange Commission* v. *Dumaine*, 218 F. 2d 308, 314 (1st Cir.), the rule in question (S.E.C. Rule U-62) provided that no securities of a company in reorganization should be bought or sold by a committee member "in any transaction in which any such person has any beneficial interest, direct or indirect."

*The full statute reads as follows: "Whoever, being an officer, agent or member of, or directly or indirectly interested in the pecuniary profits or contracts of any corporation, joint-stock company, or association, or of any firm or partnership, or other business entity, is employed or acts as an officer or agent of the United States for the transaction of business with such business entity, shall be fined not more than $2,000 or imprisoned not more than two years, or both."

Section 20a of the Interstate Commerce Act, as added February 28, 1920, c. 91, § 439, 41 Stat. 494, 49 U.S.C. § 20a. Subsection (12) of Section 20a provides in material part:

> ". . . It shall be unlawful for any officer or director of any carrier to receive for his own benefit, directly or indirectly, any money or thing of value in respect of the negotiation, hypothecation, or sale of any securities issued or to be issued by such carrier, or to share in any of the proceeds thereof, or to participate in the making or paying of any dividends of an operating carrier from any funds properly included in capital account."

Section 20a is different from Section 10 of the Clayton Act in the following respects: (*a*) it appropriately is directed at the director or officer, not the carrier, and (*b*) it deals with the problem of the officer's or director's sharing in the proceeds, which is wider in application than Section 10, which prohibits only conflicting interests in the corporate entity.

The Interstate Commerce Commission has observed the difference in the two sections. Rejecting the argument that Section 20a in the field of carrier securities was a partial repeal of Section 10, the Commission placed emphasis upon—

> "the inclusion in the former section of paragraph (12) which has the same underlying theme as section 10 but goes a step further in forbidding an officer or director to share in any degree in profits from the hypothecation or sale of securities." *Columbia Terminals Co.*, 40 M.C.C. 288, 293 (1945).

What the Government asks is that the Court go the same "step further" with respect to carrier equipment and sup-

plies as Congress did with respect to securities in adopting Section 20a.*

Nothing in the statutory language nor in the legislative history discussed in part III below suggests that Section 10 was intended to deal with commercial bribery and kindred offenses. Other types of legislation can be and indeed have been devised to meet such evils. Note, "Control of nongovernmental corruption by criminal legislation," 108 U. of Pa. L. Rev. 848; and Comment, "Bribery in commercial relationships," 45 Harv. L. Rev. 1248. "If criminal statutes are to be relied on to prevent dishonest criminal practices, more extensive legislative action seems necessary" (45 Harv. L. Rev. at 1248).

III. The Legislative History of Section 10 as Part of the Clayton Anti-trust Act Supports the Same Construction.

The Clayton Act was enacted in response to President Wilson's Message of January 20, 1914, to the Congress (Senate Rep. 698, 63d Congress, p. 14), and was designed to supplement the Sherman Antitrust Act of July 2, 1890, and other antitrust Acts (*ibid.*, p. 1.) It was to make unlawful certain trade practices which might not be covered in the earlier statutes, and, by making them illegal, arrest the creation of trusts, conspiracies and monopolies in their incipiency (*ibid.*; p. 1; *Standard Fashion Co.* v. *Magrane-Houston Co.*, 258 U.S. 346, 356; *United States* v. *W. T. Grant Co.*, 345 U.S. 629, 638, in dissenting opinion, citing *United States* v. *Sears, Roebuck & Co.* (D.C. N.Y.), 111 F. Supp. 614.)

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*Another statute involving carriers which should be noted is 18 U.S.C. § 660. The present indictment contains a second count based on Section 660. Among other things, that section prohibits officials of a carrier from abstraction or misapplication of its property or assets. (See Act of June 25, 1948, c. 645, 62 Stat. 730.)

One of these trade practices was interlocking directorates. President Wilson's Message asked for laws which "will effectually prohibit and prevent such interlockings of the personnel of the directorates of great corporations —banks and railroads, industrial, commercial, and public-service bodies—as in effect result in making those who borrow and those who lend practically one and the same, those who sell and those who buy but the same persons trading with one another under different names and in different combinations, and those who affect to compete in fact partners and masters of some whole field of business . . ." (*ibid.*, p. 14).

The original House bill, aimed at interlocking directorates (contained in Section 9), prohibited interlocking of directorates affecting three classes of corporations: common carriers, industrial corporations, and banking and trust corporations. With respect to common carriers, the bill forbade any interlocking of directors or other officers or employees of common-carrier corporations with any other corporation or common carrier which bought or sold or dealt in equipment, material or supplies with the carrier. It also forbade interlocking in banks and trust companies of over $2,500,000 and industrial corporations of over $1,000,000 capital (*ibid.*, p. 47).

The Senate bill retained the provisions relative to industrial corporations, struck out the provisions relative to banks and trust companies as being a subject more appropriate for legislation "in the domain of banking," and rejected the House provisions making illegal the interlocking among common carrier corporations and companies with which they dealt. The Senate Report recognized that emergencies might arise "when absolutely prohibitory law against such dealings would be most injurious to the public. In the case of railroads, calamities of fire and flood

might make it necessary in the shortest possible time and to a certain extent regardless of lesser consequences to replace engines, cars and bridges. The Committee have, therefore, recommended a substitute for the House paragraph on this subject, which, with the publicity, competitive bidding and the supervision of the Interstate Commerce Commission provided for, will, it is believed, minimize if not wholly cure the evil to be reached" (*ibid.*, p. 48).

Recognizing that these provisions might be evaded (see *infra*, p. 18), the Senate's redraft added to the provision against interlocking the words "or who has any direct or indirect interest in another corporation," etc. (*ibid.*, p. 64).*

When the bill came from conference, the phrase "any direct or indirect interest" was narrowed to what obviously was a more limited requirement, "a substantial interest."

Thus it appears that Section 10 (originally Section 9 in the House draft) as a component part of the antitrust laws was originally directed against the evil of interlocking directors or officers. The Act did *not* originate nor did it ever become a general conflict of interest law like that applicable to government officers and agents, considered in *United States* v. *Mississippi Valley Generating Co.*, 364 U.S. 520 (see *supra*, pp. 11, 12).

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*In Senate Report No. 698, under date of July 22, 1914, at page 47, what was then Section 9 of the bill was analyzed. "This is the section of the bill aimed at interlocking directorates in corporations. The purpose of the enactment is fully stated in the report of the Committee on the Judiciary at the House of Representatives . . . The first Senate amendment would substitute entirely new matter for the House provision in reference to directors of common carriers." The bill then stated (p. 12, line 7) that it would prohibit dealings between a carrier and another corporation in which an officer or director of the carrier was at the same time "an officer, director, manager, or general agent or [had] any direct or indirect interest."

It is obvious that the Clayton Act could not and did not cover all the problems that the investigation by the Interstate Commerce Commission on the collapse of the New Haven Railroad revealed.

The Government in its brief, on page 17, points out, apparently to demonstrate such an intent on the part of Congress relevant to the present case, that the New Haven "had purchased some $37,000,000 worth of cars from James W. Brady who had made substantial gifts to the officials with whom he dealt." Mr. Brady's contributions are described by the Commission as representing "gifts and obligations arising from friendship."

It was not stated by the Commission that these gifts and obligations of friendship were in fact bribes. The Commission observed, justly, that they would "tend to obscure official duty." *Financial Investigation of the New York, New Haven & Hartford Railroad Co.*, 31 I.C.C. 32, 61. At the same time, however, the report does not suggest that the Commission had in mind legislation to prevent such gifts.

On the contrary, the report is replete with narratives of abuses and mismanagement that contributed to the decline of the New Haven system. The various instances of misconduct described in the report could not all be brought under the antitrust laws, any more than the transaction involving Mr. Brady.

The Commission specifically dealt at pages 65-66 with the problem of interlocking directors, and at page 67 with conscious transgressions of the antimonopoly laws.*

*The problem of interlocking directors and stock ownership was to be a recurrent concern of the Commission. See *In re Relations Between Carriers by Rail and Carriers by Water*, 39 I.C.C. 1, 6, 22; *Mitchell Coal & Coke Co.*, 38 I.C.C. 40, 47; *In re Conditions Affecting the Production, Transportation and Marketing of Crude Petroleum*, 36 I.C.C. 429, 431-437; and *In re Rates for Transportation of Anthracite Coal*, 35 I.C.C. 220, 254, 298-302.

Recurring to the legislative history of Section 10, the concept of an "interest" which the carrier's director or officer "has" followed an objection, in a minority report by Representative Nelson, appearing in Report No. 627, Part 3, at pp. 8-9. Nelson pointed out that, while the language of the Committee's original draft might bar a common directorate, the "other corporation" could nevertheless be owned and controlled by the railroad's director or officer under the draft bill.

> "Dealings between two corporations in each of which the same men have a controlling interest are likely to result in the robbery of the minority stockholders. Such transactions should be prohibited, no matter how the interlocking control may have been secured . . . [Under the draft,] they may own all the stock of such other companies."

It is historically important to realize that the original bill in H.R. 15657 had outlawed *interlocking directorates* but not stock control. The original prohibition would have been easy to get around. The carrier's officer or director would not elect himself as the officer or director of the other corporation, but would elect his son, his agent or his lawyer. The only way in which this could be prevented was to modify the language in the natural and obvious way. The prohibition should apply, not only where there was actually a common officer or director, but also where the carrier's officer or director owned a sufficient interest to elect a relative or representative to an office or the board of the other entity.

As Senator Chilton, one of the sponsors of the bill in the Senate, put it on September 30, 1914, under the original bill "you could have your son, your cousin, or your lawyer, or your agent upon the corporation and accomplish the same thing as if you were on the board your-

self." 51 Cong. Rec. 15943. For this reason, ownership of a substantial interest was placed on precisely the same footing as a common officership or directorate.

In a chapter dealing at length with interlocking directorates, Mr. Brandeis had already specifically dealt with this problem. Other People's Money, 67-68. He had then stated that there were "four important questions" involved in "proposals for legislation on this subject." The fourth question, which he had apparently thought to go to the extreme limit for such legislation, had been:

> "4. Shall the principle be applied so as to prohibit transactions with another corporation in which one of its directors is interested merely as a stockholder?" (P. 68.)

The author, in the following chapter, had answered the questions, and, as to the possible prohibition on stock interest, answered in the affirmative.* The only question in his mind had been the relative size of the stock interest that ought to be prohibited—the Pujo Committee had recommended 10% as a limit, and Mr. Brandeis argued that even a lesser interest might have the effect sought to be eliminated (pp. 83-84).

Congress did not adopt an arithmetical test of the amount of ownership, but adopted the test of substantiality.†

* "The prohibition against one corporation entering into transactions with another corporation in which one of its directors is also interested, should apply even if his interest in the second corporation is merely that of stockholder. A conflict of interests in a director may be just as serious where he is a stockholder only in the second corporation, as if he were also a director." (P. 82.)

† The Government argues that its interpretation of the statute "is confirmed by the contemporary understanding of the railroad industry itself," basing its argument solely on an argument of Mr. Thom, General Counsel of Southern Railway Company (Gov't Brief, p. 23). We submit that Mr. Thom's testimony, if it may be taken as the "understanding of the industry," indicates that "sub-

The chronology, then, shows an original wide pattern of misconduct in railroad industry, investigated by the Interstate Commerce Commission, in the summer of 1914; then a rather narrow railroad prohibition, applicable to certain kinds of activity that were conceptually within the antitrust philosophy, and in the legislative process a continuing refinement and narrowing of the ultimately enacted product. The result is a bill which, as an antitrust law, covers interlocking directors and officers in the absence of public bidding and also interlocking control by a director or officer of the carrier by way of a "substantial interest" in the supplying or purchasing corporation.

The only case which we have found interpreting the relevant words of Section 10 supports our view. In *Beegle* v. *Thomson*, 138 F. 2d 875 (7th Cir. 1943), it was charged in

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stantial interest" related to a stock interest only, as to which he asked the Commission to declare what percentage constituted a "substantial interest." Mr. Thom's great concern, which underlay his argument, was that the Act should not apply to dealings between a parent corporation and its subsidiaries (pp. 14, 15), or to transactions between corporations, the common ownership of which is not forbidden by Section 7 (p. 18).

He posed the question finally in these terms (at pp. 41, 42):

"Now, can the Commission say that a percentage, no matter how small, of the capital stock of the selling company, or the company with which the dealing is, will not be considered a 'substantial interest', whereas anything above that percentage may or may not be a 'substantial interest' in accordance with the different nature of the different cases. If that could be said, if the Commission will find a percentage, no matter how small, of the capital stock of the company with which the transaction is, which the purchasing agent can lay down by the side of his transaction, and determine whether or not it comes within the requirements of this law, an assistant will be given to the practical performance of the duty of these people, which is incalculable, and I ask the Commission to consider that, to consider the adoption of a percentage, at which, and under which, there shall not be considered that the officer has a 'substantial interest' above which he may have or he may not have, in accordance with the nature of the case."

a civil antitrust action that the defendant, by using its large volume of freight haul as a club to coerce purchases of anti-splitting irons from itself, had compelled the Pennsylvania Railroad to purchase irons exclusively from the defendant. It was held that no violation of Section 10 was shown. "The statute creates no liability unless such an interlocking director or agency relationship exists." 138 F. 2d, at 880.

No one ever thought that this law was perfect, and it has been the subject of continuing criticism by the Commission and the Congress. See Fulda, Competition in the Regulated Industries: Transportation, § 4.14. It is there stated that "the Commission repeatedly indicated that section 10 of the Clayton Act was not sufficient to cope with the problem." The provisions of the Transportation Act of 1920, to Section 20a(12) of which we have referred in another section of this brief, were adopted in the light of this criticism (see p. 13, *supra*). Section 5.4 of the Transportation Act is another step in the same direction, prohibiting transactions to effectuate common control of two or more carriers except as provided in Section 5(2), and mentions "use of common directors" as one of the methods by which such unlawful control may be accomplished.

It may be noted that Section 9 of the original Clayton Act was indeed somewhat a departure from the usual antitrust philosophy. It prohibited embezzlement and misapplication of funds, credits or assets of a carrier by management, in language that would appropriately be found in a common larceny statute. We believe that Congress recognized that this was not an antitrust law in any usual sense, and, by the Criminal Code of 1948, Section 9 of the Clayton Act was repealed, and language substantially duplicating the original Section 9 now appears, in a more appropriate context, in Section 660 of Title 18.

The statutory context of Section 10 is significant. It is still a part of the antitrust laws. Section 1 of the Clayton Act so provides. 15 U.S.C. §12.

This Court has indeed observed that Section 10 "is, of course, an antitrust law," in *Minneapolis & St. Louis Railway Co.* v. *United States*, 361 U.S. 173, 190.

The result is that Section 10 is part of a group of statutes designed for specific purposes, and these purposes largely relate to aggregations of control and economic power. Section 10 is not a general panacea for all kinds of misconduct by railroad officials.

IV. The Section should Not be Interpreted to Subject the Innocent Carrier to Criminal Punishment for Secret Misconduct of its Directors and Officers.

One of the extraordinary results of the Government's interpretation of Section 10 is the effect upon the concededly innocent B&M. The B&M is not alleged to have been in any way remiss. It is not claimed that it let itself, deliberately, carelessly, or otherwise, fall into a situation involving common directors or deal with a company controlled by one of its officers or directors.

It is not to be presumed that Congress intended Section 10 to penalize carriers who were not only morally innocent (compare *Lambert* v. *California*, 355 U.S. 225, 227-228), but who also had no means of discovering the facts.

If Section 10 could be so interpreted, to punish the victims of a crime, we believe it would go beyond any criminal sanction yet approved by a Court.

Intent as an ingredient of crime was in this country "congenial to an intense individualism and took deep and early root in American soil" (Mr. Justice Jackson in *Morissette* v. *United States*, 342 U.S. 246, 251-252). Our

history has called for some regulations, however, as in the areas of food and drugs, by which even intent might be dispensed with, where the dangers inherent in negligence in such areas amid an urban industrial society would be intolerable. These regulations are nevertheless the exception, not the rule. The terrible risk to the public welfare, whether from adulterated food or from narcotics (compare *United States* v. *Balint*, 258 U.S. 250), justifies the elimination of a requirement otherwise indispensable to justice.

The other side of the story in "public welfare" statutes is that at least there must be some degree of opportunity for notice of facts that would set the innocent upon inquiry. Holmes, The Common Law, 55:

> "All foresight of the future, all choice with regard to any possible consequence of action, depends on what is known at the moment of choosing. An act cannot be wrong, even when done under circumstances in which it will be hurtful, unless those circumstances are or ought to be known. A fear of punishment for causing harm cannot work as a motive, unless the possibility of harm may be foreseen. So far, then, as criminal liability is founded upon wrong-doing in any sense, and so far as the threats and punishments of the law are intended to deter men from bringing about various harmful results they must be confined to cases where circumstances making the conduct dangerous were known."

The *Lambert* opinion is expressive of a view that a penal statute cannot properly be interpreted to include as offenses activities where there is no conceivable opportunity of notice.

The Court has noted, in *Wright* v. *Georgia*, 373 U.S. 284, 293, after citing the *Lambert* decision, that it was "well

established that a conviction under a criminal enactment which does not give adequate notice that the conduct charged is prohibited is violative of due process."* Section 10, as interpreted by the Government, would not give any notice at all. The carrier would be precisely the entity that *could* not find out the facts.

> "Engrained in our concept of due process is the requirement of notice. . . . These cases [cited by the Court in the *Lambert* opinion] involved only property interests in civil litigation. But the principle is equally appropriate where a person, wholly passive and un-

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*Mueller, "On Common Law Mens Rea," 42 Minn. L. Rev. 1043, 1102: "Reasonable men may differ about the propriety of absolute liability in the area of conduct regulations where everybody concerned knows of legislative intervention. But in a case like *Lambert* v. *California* there could be little disagreement. The moral issue was clear: this conviction does not accord with notions of morals, whatever we may wish to call these notions, e.g., due process, fair play and substantial justice, etc. The issue of utility was equally clear: no good could come of punishing a defendant under those circumstances. To the contrary, general frustration and disrespect for the law might result if substantial criminality were to rest on substantial innocence."

Compare Sayre. "Public Welfare Offenses," 33 Col. L. Rev. 55, 55-56: "Criminality is and always will be based upon a requisite state of mind as one of its prime factors. Acts alone are frequently colorless; it is the state of mind which makes all the difference between innocence and criminality. . . . To inflict substantial punishment upon one who is morally entirely innocent, who caused injury through reasonable mistake or pure accident, would so outrage the feelings of the commmunity as to nullify its own enforcement." And at 83: "In general, offenses not requiring *mens rea* are the minor violations of laws regulating the sale of intoxicating liquor, impure or adulterated food, milk, drugs or narcotics, criminal nuisances, violations of traffic or motor vehicle regulations, or of general police regulations passed for the safety, health, or well-being of the community and not in general involving moral delinquency."

aware of any wrongdoing, is brought to the bar of justice for condemnation in a criminal case.''

Mr. Justice Douglas in the *Lambert* case, 355 U.S. at 228.

V. The Bill of Particulars does Not Allege Such an Interest.

Let us now briefly examine the language of the particulars in the light of the foregoing discussion. Three elements are lacking which are generally part of an interest in a corporation or other business:

(1) Control (perhaps even more important in connection with Section 10 than other areas of law).
(2) Continuity of the relationship.
(3) Determinate share in property or profits of the entity.

The only benefit that the individuals had from the alleged relationship with International was that "pursuant to [the arrangement] McGinnis, Glacy, and Benson were to and did receive substantial monies" (R. 25).

That would not have given them any right or power to control International or to elect a director. They could not have had a voice in International's affairs by reason of an understanding that they would receive amounts of money in connection with its B&M dealings.

Not only is there no allegation of any power to control, lack of which is sufficient under the Section 10 language to defeat the indictment, but there is not even an allegation that the individuals would have a continuing or determinate share in International's profits.

Language throughout the Government's brief, referring to the understanding alleged in the particulars, appears to be based on a misreading of the indictment in this respect.

We have collected in the footnote the instances, with page references to the brief.*

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*At page 7, to the effect that Section 10 was intended to prevent officers of a carrier from causing dealings "with another firm *in whose profits* the carrier's officials expect to *share*"; on the same page, to the effect that defendants McGinnis and Glacy were assisting defendant International "in exchange for a *part of the profits*"; on the same page, referring to "an arrangement under which a carrier's officers are to *share in another firm's profits*"; on page 8, referring to an "*interest in a purchaser's profits*"; on the same page, under A, stating that the indictment and the particulars charged that McGinnis and Glacy "had *substantial interests in International's profits*"; on the same page, to the effect that they "were to *share* in or *receive* part of the *profits*"; on page 9, in reference to count II (see page 28, *infra*), to the effect that that count spelled out the details and showed "that McGinnis and Glacy were to *share in the profits*"; on pages 9-10, referring to a "claim to a substantial *share* in International's *profits* . . . *comparable to the interest of a shareholder or partner* of that firm, and greater than the interest a carrier official would have in a company which paid him a cash bribe"; on page 10, a statement that "McGinnis and Glacy *shared in* and, indeed, depended *upon the profits* they and International together could make; on page 11, referring to the Section 10 language, "any substantial interest" in such other firm, as broad enough to cover "any practical or pecuniary *interest in the profits* of another firm"; on page 12, in an attempted distinction of a cash bribe, which the Government appears to concede would not suffice, stating that "a *claim to a part of the profits* a corporation realizes from resale of property acquired from the carrier is plainly a 'substantial interest' in the purchasing corporation, giving the carrier official a highly significant stake in its profits and welfare"; on pages 12-13, that a hypothetical official, presumably like Glacy and McGinnis, is like shareholders because "he expects to *share in the profits*" and has a "conflicting *interest in the profits* of the purchasing corporation"; on page 13, referring to the "individual appellees' *interest in International's gain* from any transaction with the carrier"; on page 13, to the effect that, the "greater the harm to the carrier," the "more certain and *greater the profits* to International of which they would receive a substantial part"; on page 14, comparing the particulars with a partnership, stating that McGinnis and Glacy would have had, in that form, with the same dealings, a "claim to

The absence of any alleged proration of profits indeed stands as a sufficient reason why there is no "interest." The indictment is drawn so as to distinguish quite clearly between (*a*) the "profits" which the arrangement was to generate for International and (*b*) the "substantial monies," not alleged to be tied to those "profits" either in amount or by way of condition, which "pursuant to" the arrangement were to be paid to the individuals.

Questions of honesty and dishonesty should be immaterial in establishing the existence or nonexistence of an "interest" in a "corporation." Compare Cahn, The Moral Decision, 293-294. In view of the tone of the Government's brief, however, we would be remiss if we did not point out that there is no specific allegation of bad faith or dishonesty in count I.

Much of the actual argument of the Government is indeed based on count II, perhaps for psychological reasons.*

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a *part of the profits*"; on the same page, to the effect that Section 10 "requires competitive bidding where the carrier officials have a *claim to part* of another corporation's *profits* from dealings in property"; on page 15, to the effect that Section 10, in referring to "substantial interest," includes "an *interest* in the purchaser's *profits* from dealings"; and, on page 25, stating that Congress could not have intended to prohibit interlocking directors "but not to require such protection where he [the carrier official] stands to *share in the profits* which the other firm receives as a result of its dealings with the carrier." (All emphasis is ours.)

*In footnote 2 on page 8 the brief says that International was almost a "shell" and made the purchase of the cars "with a post-dated check which it covered by the proceeds," with a page reference to count II, and that the resale of B&M equipment was a major part of its business, again referring to count II. In the text at that page, and on page 9, the argument is that the "allegations of Count II of the indictment, charging a different violation of the same transaction, *spell out the details of the transaction.*" (Our emphasis.) The whole argument, from page 9 through page 15, is predicated on count II, not upon count I. Count I and the particulars at R. 24-25 nowhere suggest that International was a shell or that the profit from the transaction in question was large.

The unsoundness of construing count I in the light of count II is demonstrated by a very cogent illustration. Within the month, the Government has secured two other indictments of the same individuals, and one of them sets up the same allegations of "substantial interest" as are contained in the particulars to count I, but in that case there is nothing equivalent to the present count II.

The language of count I does not incorporate anything in count II. Such an incorporation, if intended, would have been permitted by Rule 7(c) of the Rules of Criminal Procedure, providing in part: "Allegations made in one count may be incorporated by reference in another count." The fact that there was no incorporation of count II into count I (compare incorporation of paragraph 2 of count I into count II, R. 10, and of paragraph 3 of count I into count II, R. 11) presumably means that incorporation was not intended.*

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*For example in *United States* v. *Gordon*, 253 F. 2d 177 (7th Cir.), a four-count indictment was returned for possessing goods stolen in interstate commerce (counts 1 and 3) and for further transporting the goods (counts 2 and 4), and the defendant wa convicted on all four counts. After this Court reversed the conviction (344 U.S. 414), he was found guilty again on all four counts. On appeal he argued that counts 1 and 3 were subject to dismissal because they did not allege the value of the stolen goods. The proof at the trial was clear that the goods were worth more than $100, and counts 2 and 4, which involved exactly the same goods as counts 1 and 3 respectively and which actually incorporated those counts by reference, in fact alleged that the goods were worth more than $100. The Court nevertheless held that counts 1 and 3 were bad, stating (253 F. 2d at 180):

"The government argues 'that after reading the indictment in this case there could be no doubt in anyone's mind that the goods set forth in counts 1 and 3 were valued at more than $100.' Assuming such to be true, the argument is beside the issue. Each count must be judged on its own allegations, either those made directly or by reference."

The Court quoted the statement of Mr. Justice Holmes in *Dunn* v. *United States*, 284 U.S. 390, 393, mentioned above, that "Each

The Government's repeated reference to the substance of count II, in these circumstances, is on precisely the same footing as a reference to newspaper articles or other extraneous material would be in support of an indictment. Such items ought to be coldly disregarded.

All this we assume is well settled as a matter of law. *Joplin Mercantile Co.* v. *United States,* 236 U.S. 531, 536. *Dunn* v. *United States,* 284 U.S. 390, 393. In the *Dunn* opinion it is stated that "Each count in an indictment is regarded as if it was a separate indictment."

CONCLUSION.

It is respectfully submitted that the Court should affirm the judgment of the District Court.

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count in an indictment is regarded as if it was a separate indictment" (*ibid.*). See also *Walker* v. *United States,* 176 F. 2d 796, 798, where the defendant was indicted in four counts for illegal sales of narcotics: "Appellee contends that because appellant was charged (under the four counts) with making four distinct and separate sales, it can be easily inferred that he was a dealer and therefore required to register. This contention ignores the rule that each count in an indictment is regarded as if it were a separate indictment and must be sufficient in itself."